



June 24, 2016

Via Electronic Submission

Christopher Kirkpatrick
Secretary of the Commission
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

RE: *Comments on Public Staff Roundtable on Elements of Regulation Automated Trading (“Regulation AT”), RIN 3038-AD52*

Dear Mr. Kirkpatrick:

Intercontinental Exchange, Inc. (“ICE”) appreciates the opportunity to provide comments and recommendations to the Commodity Futures Trading Commission (“CFTC” or “Commission”) in response to the Commission’s public staff roundtable on elements of Regulation Automated Trading (the “Proposal”, Proposed Rules” or “Regulation AT”), which is designed to enhance the regulatory regime for automated trading on U.S. designated contract markets (“DCMs”). As Background, ICE operates regulated derivatives exchange and clearing houses in the United States, Europe, Canada and Singapore, and as such has a practical perspective of the implications of the proposed automated trading regime. ICE previously submitted comments in response to the Commission’s Notice of Proposed Rulemaking on Regulation AT.¹

Executive Summary

ICE appreciates the Commission reopening the comment period for specific elements of Regulation AT and supports the Commission’s decision to continue working to find the right balance of flexibility and oversight with respect to the Proposed Rules. As noted previously, ICE generally supports the Commission’s policy goals and objectives in enhancing the regulatory regime for automated trading. Given the significance of the Proposed Rules, ICE however believes it is critical that the Commission adopt an approach that avoids unnecessary complexity, accurately reflects trading activity that may impact orderly markets and leverages the current risk management infrastructure employed by DCMs and market participants.² To that end, ICE

¹ICE’s comments herein supplement its prior comments regarding Regulation AT. ICE incorporates its prior comments by reference and urges the Commission to evaluate ICE’s prior comments in conjunction with the comments below prior to adopting any finalize version of Regulation AT.

²In addition to the comments and recommendations set forth herein, ICE also supports the Futures Industry Association (“FIA”) Comment Letter (Jun. 24, 2016).

reiterates its concern that the Proposed Rule is overly broad and prescriptive and may not capture the appropriate risks in the market. As such, ICE specifically encourages the Commission to modify the following elements of the Proposal:

- Require pre-trade risk controls for all market participants who access a DCM;
- Remove the Direct Electronic Access (“DEA”) component from the definition of an AT Person;
- Avoid using quantitative measures to define Algorithmic Trading or an AT Person;
- Refine the definition of Algorithmic Trading to focus on trading activity that may pose a risk to the market;
- Ensure that the definition of an AT Person focuses on Algorithmic Trading;
- Remove the requirement that source code be held in a repository and be treated as books and records currently covered under § 1.35 of the CEA; and
- Split the AT Person registration requirements for Algorithmic Trading systems into a separate rulemaking.

Pre-Trade Risk Controls

ICE agrees with the Commission that pre-trade and other risk controls are critical to ensuring orderly markets and minimizing the risk of a market disruption. To that end, ICE believes that all market participants that engage in electronic trading on a DCM should maintain appropriate minimum pre-trade and other risk controls, regardless of how market participants access a DCM or whether the market participants engage in algorithmic trading. There is a potential for any market participant that trades electronically to impact a market. Limiting mandatory risk controls to AT Persons complicates the Proposal and does not serve to enhance the oversight of algorithmic trading activity that may pose a risk to orderly markets. The proposed application of § 1.80 solely to persons who are already registered with the CFTC or to non-registrants who access a DCM utilizing DEA to trade for their own account does not accurately capture this risk.

ICE previously commented on the appropriate location for pre-trade risk and other controls and believes that the Commission should not mandate the same risk control requirements across DCMs, FCMs and AT Persons³. Any proposed risk control requirements should instead be tailored to reflect the risks specific to each entity. For example, many of the market protections grouped under the heading of “pre-trade risk controls” including market protections related to order throttling, price collars and certain implementations of self-trade prevention functionality, are more appropriately situated and administered by the DCM than the trading firms and FCM.

³ Please see ICE’s Comment Letter (Mar. 15, 2016) at Appendix A, pgs. 8-10.

Definition of Algorithmic Trading and AT Person

ICE encourages the Commission to adopt definitions of Algorithmic Trading and AT Person that focus on algorithmic trading activity that may pose a risk to the derivatives markets. It is critical that the Commission correctly define Algorithmic Trading and accurately capture the appropriate market participants and trading activity. As drafted, the definition of Algorithmic Trading is overly broad and may include a wide range of market activity that would not otherwise amount to algorithmic trading activity. Furthermore, the proposed definition does not capture the type of systemic risk that the Proposed Rules attempt to target. As previously discussed, the definition of Algorithmic Trading should be appropriately tailored to avoid the imposition of unnecessary costs and burdensome compliance obligations. The definition of Algorithmic Trading should also be consistent with the Commission's intended goal of impacting a limited and discrete set of market participants. Additionally, rather than using DEA or other quantitative measures as a filter for determining which market participants should qualify as an AT Person, the Commission should instead focus on developing a more accurate definition of Algorithmic Trading.

In addition, the proposed definition of Algorithmic Trading excludes orders where every parameter is manually entered without further discretion by a computer system or algorithm. The definition could therefore potentially include the use of an auto-spreader, smart order types, iceberg orders, or simple order management tools which are widely available as part of exchange offered functionality or through off-the-shelf trading software. The potential risks posed by these tools are not equivalent to an algorithmic execution system that generates and submits orders to the DCM without any human interference. Errors in these forms of automation are less likely to create a material market impact because the initial order has been inputted and directed by a natural person.

By contrast, the definition of Algorithmic Trading under MiFID II excludes systems used exclusively: 1) to route orders to one or more trading venue; 2) for processing orders with no determination of any trading parameters; or 3) for order confirmation or post-trade processing of executed transactions.⁴ ICE generally supports ESMA's approach, however ICE believes that exclusions for simple automated tools that are commonly used by persons who have not developed automated execution systems should be applied to the Commission's definition of AT Person. Such exclusions may include:

- Automated Order Routing Systems (AORS);
- Order processing systems that do not determine trading parameters;
- Order confirmation or post-trade processing tools;
- Smart order functionality;
- Iceberg orders; and
- Simple order management tools.

⁴ European Commission, "Updated rules for markets in financial instruments: MiFID 2" (June 12, 2014), available at http://ec.europa.eu/finance/securities/isd/mifid2/index_en.htm.



This definition of AT Person along with the corresponding exclusions would better capture the type of trading activity that the Proposal intends to cover.

Application of the Proposed Rules to AT Persons

ICE is concerned that Regulation AT incorrectly presumes heightened risks associated with algorithmic trading conducted via DEA, which triggers an unnecessary registration requirement. ICE believes that the concept of DEA should be removed from the Proposed Rules wholesale. DEA should not be a condition for determining who qualifies as an AT Person as it may unnecessarily exclude certain market participants that engage in algorithmic trading but would not otherwise be subject to the registration requirement. Regardless of the connectivity-method, a market participant engaged in electronic trading will be subject to the FCM pre-trade and other risk controls established under § 1.82 and the risk management obligations under § 1.73. Further, DCM rules require FCMs to use exchange provided controls to facilitate its risk management obligations.

ICE is also concerned with the staff roundtable discussions of using quantitative measures as a filter for identifying algorithmic trading. Such quantitative measures would be ineffective, not only because they are market specific, but because they would be dependent on highly variable factors such as the length of the observation period, the overall market activity during that period and the relative concentration or fragmentation of market activity. These measures would serve as an unreliable indicator of whether an order message or trade is derived from an algorithmic program. For example, a quantitative measure of traded volume could be equally indicative of manually entered orders or orders entered via an algorithmic program. Further, a quantitative calculation is highly dependent on it being applied by the appropriate entity with the appropriate level of messaging information. For example, an FCM would not have full insight into the overall messaging activity of an AT Person given that an AT Person's activity would likely span across multiple independent FCMs. Instead of using a quantitative measure or DEA as a determinant of AT Person status, ICE encourages the Commission to focus on narrowing the definition of Algorithmic Trading or adopting a set of exclusions to its current definition.

Source Code

As previously noted⁵, ICE believes that the production of source code to the government should be limited to instances where a subpoena has been issued. ICE recommends that the Commission remove the requirement that source code be held in a repository and instead treat source code as books and records as currently covered under § 1.35 of the CEA. Requiring firms to disclose data to the government in circumstances could expose firms to serious intellectual property risks and cyber security attacks.

⁵ ICE's Comment Letter (Mar. 15, 2016) at pg. 7.



Separation of Rulemaking

ICE supports Chairman Massad's willingness to finalize the Proposal in phases.⁶ In separating the Proposal, ICE recommends that the Commission consider the Proposed Rules as discrete rulemakings based on the targeted population. To that end, requirements specific to AT Persons or persons engaged in Algorithmic Trading should be considered in a rulemaking separate from requirements that are applicable to all market participants.

As discussed above, ICE believes that the pre-trade risk controls outlined in § 1.80, 1.82 and 40.20 should apply to all market participants, regardless of whether the market participant engages in Algorithmic Trading. The pre-trade risk control requirements detailed in these sections of the Proposed Rules, once appropriately tailored, should be implemented independent from the rest of the rulemaking. These pre-trade risk requirements should not be specific to AT Persons and should therefore not be included in the same rulemaking as requirements that are specific to that population.

ICE does not believe that registration for AT Persons is necessary. If the Commission nonetheless determines to move forward with the registration requirement for AT Persons, these registration requirements should be finalized in a separate rulemaking. As discussed above, ICE encourages the Commission to adopt definitions of an AT Person and Algorithmic Trading that focus on potential market risk. ICE also suggests that the definition of AT Person take into consideration exclusions for simple automated tools that are commonly used by persons who have not developed automated execution systems. Given that the standards for the development, testing, monitoring and compliance of Algorithmic Trading systems included in the Proposed Rules depend on definitions of AT Person and Algorithmic Trading these requirements should likewise be proposed away from pre-trade risk control requirements. Alternatively, these standards could be included in a separate rulemaking concerning AT Person registration.

Conclusion

ICE appreciates the Commission hosting the roundtable to further discuss aspects of the Proposal. The Proposed Rules will have a significant impact on a large number of market participants and if not appropriately drafted and implemented, may threaten to disrupt currently effective risk management implementations and orderly markets. As such, the Commission should adopt an appropriately reasoned, principals-based approach to this significant rulemaking. Given the complexity of the rulemaking and the potential market impact, ICE encourages the Commission to continue to work with the industry and provide additional opportunities for comment and discussion on aspects Proposed Rules that were not included in the current roundtable. Again, ICE thanks the Commission for the opportunity to comment on the Proposed Rules.

⁶ Keynote Remarks of Chairman Timothy Massad before the Global Exchange and Brokerage Conference (June 9, 2016), available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opamassad-47>.



Sincerely,

A handwritten signature in black ink, appearing to read 'Kara Dutta', is positioned above the printed name.

Kara Dutta
Intercontinental Exchange, Inc.



Appendix A

**ICE’s Responses to Specific Topics and Questions Raised in the Staff Roundtable on
Elements of Regulation AT**

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I. Roundtable Panel I: Amendments to the Definition of Direct Electronic Access (DEA), Consistent with the Proposed Rules' Registration Requirements

1. Commenters have questioned whether the proposed definition of DEA in § 1.3(yyyy) is overly broad. CFTC staff would like to further explore what commonly used connectivity methods are potentially captured by the proposed definition, and what segments of the market use such connectivity methods.

- a. For each such connectivity method potentially included by the proposed definition of DEA in § 1.3(yyyy), please describe:*
 - i. the connectivity method (APIs, GUIs, AORS, third-party ISVs, etc.);*
 - ii. the types of market participants that typically use such method and the type of trading for which they use it; and*
 - iii. the specific language in the proposed definition of DEA in § 1.3(yyyy) that results in the capture of such market participants.*
- b. In any final rules that the Commission may adopt, should any of the connection methods described above not be considered DEA, and accordingly be excluded from the definition of DEA in § 1.3(yyyy)? If so, please explain why, and describe regulatory language that would accomplish such exclusion.*

As discussed previously, ICE recommends that the Commission remove the DEA component from the Proposed Rules wholesale, as DEA does not serve as a useful proxy for determining whether a market participant should qualify as an AT Person. Based on the question above, ICE is concerned that the Proposal incorrectly presumes heightened risks associated with algorithmic trading conducted via DEA, which triggers an unnecessary registration requirement. The connectivity methods identified above are not necessarily indicative of algorithmic trading activity and a registration requirement that hinges on such a connectivity method would therefore be inappropriate.

ICE believes that market participants should be subject to reasonable pre-trade and other risk controls to prevent potential market disruptions regardless of how the market participants access a DCM. Further, DCM rules require FCMs to use Exchange provided controls to facilitate its risk management obligations and pre-trade and other risk management controls. These controls made available by the DCM are generally seen as an extension of the clearing FCM's own risk management infrastructure. This requirement applies to all market participants, regardless of how the DCM is accessed. Therefore, an order routed to a DCM via any of the connectivity methods identified above will pass through the risk management infrastructure of an FCM.

2. Existing Commission regulation § 38.607 requires DCMs to provide, for use by FCMs, certain systems and controls in connection with customers' DEA to the exchange. In the context of § 38.607:

- a. *How do DCMs, FCMs, and other panelists or commenters interpret the population of market participants subject to § 38.607?*
- b. *What types of market participants make use of DEA, and what kinds of trading strategies do they typically pursue?*
- c. *For DCM and FCM panelists or commenters, approximately what percent of market participants use DEA?*

As discussed in response to Question 1 above, DEA is not an appropriate filter for determining whether a market participant should qualify as an AT Person, regardless of whether the definition follows that in Commission Regulation § 38.607 or the Proposed Rules.

3. *If the Commission were to adopt final rules for Regulation AT including a final definition of DEA in § 1.3(yyyy), should the Commission use the definition of direct electronic access in § 38.607 rather than the definition proposed in 1.3(yyyy)? Why, or why not?*
 - a. *What are the differences in the sets of market participants captured by each definition?*

As discussed in response to Question 1 above, DEA is not an appropriate filter for determining whether a market participant should qualify as an AT Person, regardless of whether the definition follows that in Commission Regulation § 38.607 or the Proposed Rules.

4. *The proposed definition of DEA in § 1.3(yyyy) makes reference to “a separate person who is a member of a derivatives clearing organization to which [the transaction] is submitted for clearing.” Would it be preferable to revise the definition to instead reference the infrastructure of the executing FCM?*

As discussed in response to Question 1 above, DEA is not an appropriate filter for determining whether a market participant should qualify as an AT Person and should be removed from the Proposed Rules wholesale.

5. *To the extent commenters believe that the proposed definition of DEA in § 1.3(yyyy) should be further clarified, including with respect to the term “routed,” what alternative language could be proposed?*

As discussed in response to question 1 above, DEA is not an appropriate filter for determining whether a market participant should qualify as an AT Person and should be removed from the Proposed Rules wholesale. In the event that the Commission does not remove the concept of DEA from the Proposed Rules, ICE recommends that the definition be revised to clarify that orders routed through a clearing member means any orders that pass through FCM controlled and calibrated pre-trade and other risk controls, including such controls that are established and located at the DCM.

II. Roundtable Panel II: Covered Parties I—Quantitative Measures to Establish the Population of AT Persons:

1. If the Commission were to adopt a quantitative threshold, which metrics would be most suitable for establishing the threshold for potential AT Persons to be subject to Regulation AT?

- a. Relevant considerations include the risks posed by market participants captured at different quantitative levels, the ease of administration for market participants and the Commission of different quantitative options, and potential harmonization with other regulators.*

ICE encourages the Commission to avoid using quantitative measures to define AT Persons. As discussed above, quantitative measures would be an ineffective indicator of Algorithmic Trading, not only because they are market specific but because they would be dependent on highly variable factors such as the length of the observation period, the overall market activity during that period and the relative concentration or fragmentation of market activity. Further, quantitative measures are not reflective of potential market risk, which should be the focus of the Proposal. Even though messaging frequency and the use of an algorithmic trading strategy may correlate in some instances, it would be inappropriate to use this correlation as an indication of Algorithmic Trading in all instances.

2. Once a metric is determined, should this metric be calibrated to market activity across products and across DCMs? If so, how?

As discussed in response to Question 1 above, a quantitative metric should not be used to determine AT Person status. Further, quantitative measures would be difficult to implement. Any quantitative threshold calculation that is used to identify AT Persons would depend on it being applied to the correct entity and market and would require insight into the market participant's strategy. For example, market participants commonly submit orders across multiple FCMs throughout a trading session.

3. If any quantitative threshold incorporates either order message or trade data, should all messages and/or trades be weighted equally?

- a. Are there subsets of messages and/or trades which should not be included in the calculation of a quantitative threshold?*
- b. Should messages sent by a firm on an agency basis be considered equivalently to those sent on a principal basis?*

c. Over what timeframe should measures be calculated/benchmarked (e.g., a metric is defined as average daily counts over the course of a month or quarter)?

ICE is concerned with the inclusion of trade data in the staff roundtable discussions on quantitative measures. The Proposal and its definitions of Algorithmic Trading and AT Person, pre-risk control requirements, conformance testing requirements, source code, and compliance obligations focus on orders that are routed to a DCM, not on trade frequency or on traded volumes. It is important that the Commission not mistake order and trade activity, particularly given the scope of the Proposal focuses on pre-trade activity.

Regardless, a quantitative threshold that hinges on trade activity would be inappropriate. For example, large transactions sizes are certainly not limited to automated trading strategies and could likely be the result of a manually entered order. Additionally, a single large order could be filled in multiple size increments depending on market demand or depth of the order book.